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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBERT RAY ACEVES, JR., Appellant.	)	2 CA-CR 2007-0182 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052760

Honorable Richard S. Fields, Judge

AFFIRMED

DiCampli, Elsberry & Hunley, LLC
By Anne Elsberry
Tucson
Attorneys for Appellant

P E L A N D E R, Chief Judge.

¶1 After a jury trial, appellant Robert Ray Aceves, Jr. was convicted of armed robbery, aggravated assault, and theft of a means of transportation. Counsel filed a brief

pursuant to *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she found no nonfrivolous issues to raise. Aceves has filed a supplemental brief.

¶2 Aceves first contends the trial court erred when it denied his motion to "suppress identification testimony" of a victim who had selected Aceves out of a photographic lineup. Aceves contended the "line-up process used by police was unduly suggestive" for a number of reasons, including the fact that apparently the victim had been shown multiple photographic lineups, one of which contained a photograph of Aceves.[1]

¶3 The trial court denied the motion after conducting a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), finding the procedure had not been unduly suggestive. We review a trial court's ruling on a challenge to an identification for a "clear abuse of discretion." *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002). Before admitting evidence of the pretrial identification of a defendant, a trial court is required to determine whether the pretrial identification procedure was unduly suggestive and, if so, whether the identification was derived from an independent source and was thus reliable notwithstanding the suggestive procedure. *Dessureault*, 104 Ariz. at 384, 453 P.2d at 955. The fact that there was "[m]ere suggestion" during the identification procedure does

[1]At times, Aceves's argument appears to relate to the in-court identification of him, but at other times, he seems to challenge the introduction of evidence regarding the pretrial identification. The motion, which was filed before the court declared a mistrial in Aceves's first trial, related to both. But the victim did not identify Aceves during trial.

not mean the defendant's due process rights were violated. *State v. Tresize*, 127 Ariz. 571, 574, 623 P.2d 1, 4 (1980). "'Rather, in order to make out a constitutional violation, the suggestion must be so "unnecessary" or "impermissible" as to create a "substantial likelihood of irreparable misidentification" based on the "totality of the circumstances."'" *Id.*, *quoting United States v. Sambrano*, 505 F.2d 284, 286 (9th Cir. 1974), *quoting Neil v. Biggers*, 409 U.S. 188, 197-98 (1972).

¶4 The victim testified at the *Dessureault* hearing about the identification procedure and how he had been able to identify Aceves as the person responsible for the "car-jacking style" incident. He explained he had been shown multiple sheets of photographs, each containing six pictures, as part of a process he described as appearing to be "random" and testified that he had seen Aceves's photograph on one of the sheets and identified him. He denied the officer had made any suggestions to him and testified he had identified Aceves on his own. Aceves suggests the procedure was somehow suspect because he did not learn until the victim testified at the *Dessureault* hearing that the victim had been shown more than one sheet of photographs. But that fact did not render the procedure unduly suggestive, and nothing at the hearing establishes otherwise.

¶5 The victim was unequivocal at the hearing that the person he had identified was the perpetrator, and he was equally certain of his identification at trial. Defense counsel raised the issue relating to multiple photograph sheets having been shown to the victim at the hearing, stating it was the first he had learned about that and that this had raised

additional questions about the process. But those concerns were subsequently addressed through the summary obtained from the officer after defense counsel and the prosecutor contacted him by telephone. In that summary, the officer had explained he had not shown four separate sheets with different individuals but rather separate sheets that were photographs of the same people, including Aceves.

¶6 Aceves makes much of the fact that two other witnesses had not been able to pick his photograph out of the lineup. But, as the state argued at the hearing, that fact actually supports the state's argument that the procedure was not unduly suggestive. Additionally, Aceves complains he did not have the opportunity to cross-examine the officer who was contacted by telephone during the hearing and who provided the summary that became part of the record. Again, the parties agreed to the process of contacting the officer by telephone and allowing the prosecutor to summarize what the officer had said about not having mentioned his use of multiple sheets. Based on this record, Aceves has not established the trial court abused its discretion by finding the identification procedure used was not unduly suggestive and thus denying Aceves's motion to preclude the state from introducing evidence of the pretrial identification procedure.

¶7 Next, Aceves contends the trial court abused its discretion by only granting in part his motion in limine, which was filed after the court had declared a mistrial in the first trial held on these charges. Aceves sought in his motion to prevent the state from impeaching his mother if she were to testify inconsistently with a statement she had made

to police. He contended this was an improper use of impeachment because the statement was not recorded but was contained in an officer's report and was based on the officer's recollection of what Aceves's mother had said when the officer had interviewed Aceves. Aceves contended, too, that, if his mother were to "testif[y] that she **did hear** the conversation and knew its general subject, but did not actually overhear an[y] specific admission[]s by the defendant, th[e]n she [could not] be impeached." The court ruled that it would permit the state to impeach Aceves's mother only with statements that the officer had noted in his report.

¶8 Aceves contends on appeal the court impermissibly allowed introduction of this hearsay. We will not disturb a trial court's ruling on the admissibility of evidence absent an abuse of discretion. *State v. Sucharew*, 205 Ariz. 16, ¶ 19, 66 P.3d 59, 66 (App. 2003). We see none here. The officer had documented in his report that Aceves's mother had told him she had heard her son "talking about taking the victim['s] car while he was talking to his father." At trial, the mother denied having told the officer she had overheard a conversation between her son and husband about the car. The court permitted the officer to testify that Aceves's mother had told him she had heard Aceves telling his father about having taken the victim's car. The court limited the testimony to what was in the report and did not abuse its discretion. This was a permissible use of a prior inconsistent statement to impeach a witness. *See* Ariz. R. Evid. 801(d)(1)(a); *see also Sucharew*, 205 Ariz. 16, ¶¶ 20-23, 66 P.3d at 66.

¶9 Aceves next contends his convictions for multiple offenses violated prohibitions against double jeopardy because they were the result of "one single action, one offen[s]e[—]Armed Robbery. A.R.S. [§] 13-1904." He seems to suggest that, because the three offenses share statutory elements, he could not be convicted of all three. Aceves argues the elements of the offenses of theft of a means of transportation and aggravated assault "are also present in the elements of the crime for armed robbery." This issue was not raised below and, therefore, he has forfeited review for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Because the relevant statutes each contain independent, different elements and Aceves committed acts satisfying the elements of the applicable statutes, there was no double jeopardy violation here and no error, fundamental or otherwise.

¶10 For purposes of the state and federal constitutional prohibitions against double jeopardy, we first examine the elements of the statutes pursuant to which a defendant has been convicted, rather than the facts of the case, in order to determine whether the defendant has suffered multiple convictions for the same act. *See State v. Siddle*, 202 Ariz. 512, ¶¶ 7-10, 47 P.3d 1150, 1153-54 (App. 2002). "Distinct statutory provisions constitute the same offense if they are comprised of the same elements." *Id.* ¶ 10. But, as we recently explained in *State v. Ortega*, 541 Ariz. Adv. Rep. 3, ¶ 9 (Ct. App. Oct. 14, 2008), quoting the United States Supreme Court's decision in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), when "'the same act or transaction constitutes a violation of two distinct statutory

provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" *Ortega*, 541 Ariz. Adv. Rep. 3, ¶ 9. "Thus a defendant may not be convicted for both an offense and its lesser included offense" when based on one act. *Id.*; *see also State v. Price*, 218 Ariz. 311, ¶ 5, 183 P.3d 1279, 1281 (App. 2008) ("For double jeopardy purposes, a lesser included offense and the greater offense of which it is a part constitute the same offense, and multiple punishments for the same offense are not permissible.").

¶11 A lesser-included offense "consists solely of some but not all of the elements of the greater offense such that it would be impossible to commit the greater offense without committing the lesser." *State v. Tschilar*, 200 Ariz. 427, ¶ 39, 27 P.3d 331, 340 (App. 2001). Comparing the elements of the three offenses of which Aceves was convicted, we find none of the offenses is a lesser-included offense of the others. Each offense includes a distinct element and, therefore, each "'requires proof of a fact which the other does not.'" *Ortega*, 541 Ariz. Adv. Rep. 3, ¶ 9, *quoting Blockburger*, 284 U.S. at 304; *see also* A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2) (aggravated assault requires, inter alia, a person's "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury" and "us[ing] a deadly weapon or dangerous instrument"); A.R.S. § 13-1814(A)(5) (vehicle theft requires a person's "[c]ontrol[ling] another person's means of transportation knowing or having reason to know that the property is stolen"); A.R.S. §§ 13-1902(A), 13-1904(A) (armed robbery requires, inter alia, a person, "in the course of taking any property

of another from his person or immediate presence and against his will," "threaten[ing] or us[ing] force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property," and while using or threatening to use "a deadly weapon or dangerous instrument or a simulated deadly weapon").

¶12 In view of the statutory differences in the elements comprising the three offenses, Aceves's constitutional double jeopardy rights were not violated by the three convictions. To the extent Aceves also suggests his statutory right against double punishment has been violated, *see* A.R.S. § 13-116, we reject that argument as well. Aceves was sentenced to concurrent prison terms; thus, there could be no violation of § 13-116 here. *State v. Harmon*, 132 Ariz. 54, 56, 643 P.2d 1024, 1026 (App. 1982).

¶13 We summarily reject Aceves's contention that the jury selection process was unfair. The record does not support this claim. We also reject his contention that a plastic knife should not have been regarded as a deadly weapon.[2] The offenses of armed robbery and aggravated assault can be based upon the use of a dangerous instrument. *See* §§ 13-1204(A)(2), 13-1904(A)(2). Even assuming, without deciding, that a plastic knife is not a deadly weapon, the jury reasonably could find the knife in this case qualified as a dangerous

[2]One victim had stated during the 9-1-1 call that the person who had attacked him was using a plastic knife. But this victim testified he had been afraid. The other victims testified that the knife was sharp, the perpetrator had tried to stab with it, and they believed it could have caused harm.

instrument, which was defined in the instructions consistently with A.R.S. § 13-105(11). Additionally, Aceves complains he was "convicted of a dangerous offense" but sentenced "under non-dangerous category." We see no sentencing error based on the record before us. The aggravated assault and armed robbery were properly classified as dangerous-nature offenses, after the jury made that finding, and Aceves was sentenced accordingly.

¶14 Finally, we reject the remaining issues Aceves lists, suggesting we consider whether each resulted in fundamental error. We have found no such error after reviewing the entire record.

¶15 Aceves's convictions and sentences are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge